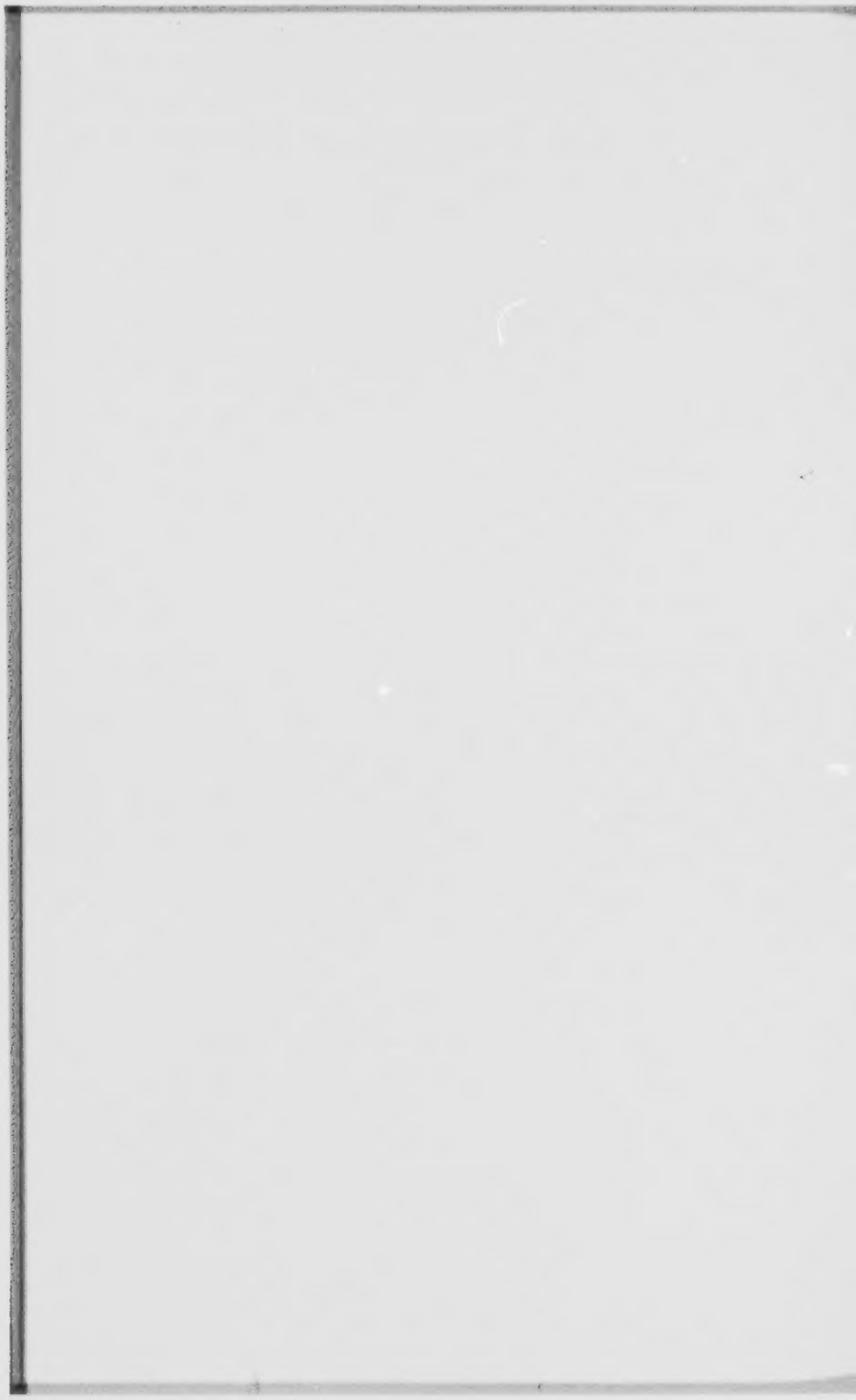

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 722

V. J. ADAMS, Trustee for General Box Company, Inc., Bankrupt,

Petitioner,

vs.

CITY BANK AND TRUST COMPANY OF MACON, GEORGIA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Below in parallel columns are the new act and the old act with the words immaterial to the question omitted;

Section 60.

Chandler Act	Old Act
"a. A preference is a transfer * * * of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition	"a. A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition * * *, made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one

in bankruptcy * * *, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein. * * *

"b. Any such preference may be avoided by the trustee if the creditor receiving it * * * has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent * * * ."

of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of recording * * * of the transfer, if by law such recording * * * is required or permitted.

"b. If a bankrupt shall have * * * made a transfer of any of his property, and if at the time of the transfer * * * or of the recording * * * of the transfer if by law recording * * * thereof is required, and being within four months before the filing of the petition in bankruptcy * * * the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it * * * shall then have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee * * * ."

Every transfer of every character made by a debtor prior to bankruptcy must face the test of section 60; and no transfer may escape condemnation as a preference merely by applying the first sentence of section 60 (a) to the transaction.

The trustee does not at all contend that a preference is other than a transfer for an antecedent debt, but the unanswered and unanswerable contention of the trustee is that the date of perfection as against a bona fide purchaser or creditor is the controlling date in determining whether the transfer was given on account of a present or an antecedent debt. The trustee does contend that it is enough in this case that the debt existed when the transfer was perfected as against purchasers and creditors by recordation. The words "shall be deemed to have been made" are as meaningful in determining whether the transfer was given on account of an antecedent debt as they are in determining whether the transfer was given while the debtor was insolvent or within the four months prior to bankruptcy.

Treating the date of recordation as the effective date of the transfer instead of its actual date is no revolutionary conception.

Many courts, as will hereinafter be shown, many years ago thought that Congress intended under the old act to strike down every secret transfer.

It is true that in the Act of 1898, section 60 made no reference to the recording or registering of the transfer.

However, in 1903 Congress amended section 60 by adding to sub-section (a) the provision: "Such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required."

As early as 1905, we find Judge Archbald, a learned judge of the District Court of Pennsylvania, saying that the date of recording had by the amendment of 1903 become the controlling date.

> "Held, That the right of the trustee to set aside the conveyance was to be determined by reference to section 60a of the bankruptcy act * * * as amended by Act February 5, 1903. * * * according to the

proper construction of which a deed by which a transfer of a bankrupt's property is effected, under which no possession is taken, *is to be judged on the question of preference by the date when it is put on record,* regardless of the date of delivery. * * *'' (Emphasis ours.)

English v. *Ross,* 140 Fed. 630 (2-d).

In 1908 the district judge of Idaho used the same identical words which are now incorporated in the Act.

"The mortgage 'transfer' must therefore be deemed to have been made on the 11th day of February, 1907 (the date of record)."

In re Hickerson, 162 Fed. 345, p. 347.

"* * * the effect of a transfer by the bankrupts as constituting a preference must be judged as of the date it was filed for record * * *."

McElvain v. *Hardesty,* (8 C. C. A.) 169 Fed. 31 (2).

Other district and circuit courts reached a different conclusion laying emphasis on the fact that section 60 (b), the enforcing section, had not been amended to conform with section 60 (a). See *Debus* v. *Yates,* 193 Fed. 427, p. 452.

Thereafter in 1910, Congress again amended section 60 by inserting in section 60 (b) the words "or of the recording or registering of the transfer if by law recording or registering thereof is required and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference."

The courts still differed as to the intention of Congress and this Court granted a certiorari to settle the question. In the case of *Cary* v. *Donahoo,* 240 U. S. 430, 60 L. Ed. 726, this Court said:

"With respect to the construction of the clause in question, (Section 60) there has been diversity of opin-

> ion in the circuit courts of appeals. In the sixth, seventh and eighth circuits the view has been taken that the word 'required' refers 'to the character of the instrument giving the preference' without regard to the persons in whose favor the requirement is imposed; that is, if the transfer is required to be recorded as to anyone, the trustee may recover if it has not been recorded more than four months before the filing of the petition in bankruptcy. * * * A different conclusion has been reached in the second, fifth and ninth circuits."

Justice Hughes then discussed the history of section 60 and he thought it to be of the greatest significance that the Senate had stricken from the amendment of 1903 as passed by the House of Representatives the words "or permitted" in the treating of recording and registering. He concluded:

> "As Congress did not undertake in section 60 to hit all preferential transfers (otherwise valid) merely because they were not disclosed, either by record or possession, more than four months before the bankruptcy proceeding, the inquiry is simply as to the nature of the requirement of recording to which Congress referred."

As a result of this decision secret transfers flourished as never before in those States where recording was not required to validate a transfer.

Hence in 1926 Congress once more amended section 60 by adding the words "or permitted", whose omission had appeared so controlling to this Court. But alas, the words were only added to section 60 (a) and section 60 (b) was untouched.

Again diversity arose, some courts saying that since Congress had not amended section 60 (b), which was the enforcing section, the addition of the words "or permitted" to section 60 (a) did not render an unrecorded transfer a preference (*First National Bank* v. *Live Stock National Bank,* 8 C. C. A., 31 F. (2d) 416); others holding that the

amendment of Congress was meaningless if not given effect to strike down all secret transfers (*Foltz* v. *Davis,* 7 C. C. A., 68 F. (2d) 495). This Court had not settled this diversity at the time of the enactment of the Chandler Act.

The intention of Congress in passing the Chandler Act is beyond cavil. With respect to section 60 the House Committee said:

> "The new test is more comprehensive and accords with the contemplated purpose of striking down secret liens. It is provided that the transfer shall be deemed to have been made when it became so far perfected that neither a bona fide purchaser nor creditor could thereafter have acquired rights superior to those of the transferee. A provision also has been added which makes the test effective even though the transfer may never have actually become perfected."
>
> (Report No. 1409, H. R. 8046, July 29, 1937, 75th Congress, 1st Session.)

> "* * * The validity of the transfer is to be tested as of the date of the recording, not of the transfer. Secret liens first made public during insolvency and with notice thereof are to be vulnerable for a period of four months. * * * Indeed, the Supreme Court has gone further and, altogether unnecessarily it would seem, recognized fictions of relation back under state law whereby a tardy perfection of a transfer validates it as of an earlier date such as the date of the execution of the instrument of transfer. All decisions to such effect are intended to encounter as flat a contradiction in the Chandler Bill as statutory English permits."
>
> McLaughlin, Aspects of the Chandler Bill to Amend the Bankruptcy Act (1937), 4 U. of Chi. L. Rev. 369, 394 (392).

The debt must exist when the transfer was made, but by section 60 (a) the transfer was made when it was perfected against purchasers and creditors, that is, when it was recorded.

This Court will take judicial notice of the fact that the Chandler Act was the result of long and arduous study, not only by the Judiciary Committee of Congress, but by the Department of Justice. Every word was intended to count in the construction of the act.

It is plain beyond argument that Congress intended to make an end of secret transfers. It has not attempted to destroy the historic import of the preference, but it has made the date of recording the date of reckoning in determining whether the debt secured is present or past.

The Circuit Court of Appeals, by its emasculation of section 60, has cheated Congress of its unmistakable purpose.

Respectfully submitted.

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Attorney for Petitioner.

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